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FEB 13 1904
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Clerk.

1445

IN THE

Supreme Court of the United States

JAMES C. FARGO, as President of the American Express Company, *Appellant*,

v.

WILLIAM H. HART, Auditor of State of the State of Indiana, *Appellee.*

No. 154.

REVISED BRIEF FOR APPELLEE.

CHARLES W. MILLER,
Attorney-General of Indiana,
Attorney for Appellee.

CASSIUS C. HADLEY,
L. G. ROTHSCHILD,
WM. O. GEAKE,
Of Counsel.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.

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STATEMENT.

This is a proceeding brought by James C. Fargo, as president of the American Express Company, to enjoin William H. Hart, auditor of the state of Indiana, from certifying down to the auditors of the respective counties in the State of Indiana the assessment made by the state board of tax commissioners upon the lines and routes of the said American Express Company in said state.

The action was first instituted on the 24th day of August, 1898. Subsequently, in the years 1899, 1900, 1901

and 1902, supplemental bills were filed, under stipulations and agreements of parties, all embodying the same propositions and for the same purposes as the original bill.

A temporary restraining order was issued by the judge of the circuit court for the district of Indiana, pleadings were filed, the issues joined, evidence taken and trial had before the Hon. John H. Baker, judge of the district court of the United States for the district of Indiana, and judgment was rendered by said judge on the 23rd day of July, 1902, dismissing complainant's bill of complaint and each supplemental bill for want of equity. From this judgment appeal was taken to this court.

Numerous errors are assigned as grounds for appeal, but the substance of the principal questions presented by appellant's brief, appears to be as follows:

One. That the state board of tax commissioners did not properly value the mileage of said company, in that it did not consider the ocean mileage in making up its computation.

Two. The state board of tax commissioners did not properly value the mileage of said appellant for the reason that it included in the valuation of its capital stock some sixteen millions of dollars of securities that were held by said company as an investment only, and which had a situs elsewhere than in the state of Indiana.

Three. That the state board of tax commissioners, under the act in question, were authorized to apportion to the tangible property within the state, upon a mileage basis, only so much of the value of the capital stock as it

was in excess of the tangible property owned by said appellant.

To these questions the appellee interposes the following propositions:

ONE.

That the court properly dismissed the bill for want of equity, for the reason that an injunction against merely assessing officers can not be maintained in a court of equity unless the tax is absolutely void or unless fraud is charged and proven.

TWO.

That where some tax is admittedly due, and only an excess is assailed, an injunction will not lie against an assessing officer and will not lie against a collecting officer, except after payment or tender of payment of the amount admittedly due.

THREE.

That what should be considered in making up the assessment of complainant company by the state board of tax commissioners, in determining the value per mile of the lines and routes of said company in the state of Indiana, was a question of fact, which, by law, is submitted to the exclusive jurisdiction of the state board of tax commissioners, and their conclusion and decision is final, and is not subject to review or collateral attack, unless fraud is charged and proven.

FOUR.

There is no showing in the record as to how the state board of tax commissioners arrived at the value per mile of the lines and routes of complainant company in the state of Indiana. There is no showing, except by averment, that the state board of tax commissioners did not take into consideration the ocean mileage of complainant company, or that said tax commissioners did not take into consideration the fact, as contended, that the bonds and securities were held, as alleged, as an investment, and had a situs outside of Indiana.

FIVE.

That the state board of tax commissioners are not bound by an ironclad rule in assessing the value of appellant's property, but it had the right to ascertain from whatever source accessible the true value of the capital stock of appellant.

SIX.

The bonds and stocks referred to were a part of the working capital of the company in the nature of cash, with no fixed situs.

SEVEN.

The record shows that, even if the state board of tax commissioners did not include the ocean mileage, and did include the value of the bonds, stocks and securities referred to, they were warranted in so doing, and their actions in that behalf did not amount to constructive fraud.

THERE IS NO AUTHORITY FOR A COURT OF EQUITY TO ENJOIN AN ASSESSING OFFICER FROM PERFORMING HIS DUTIES, AS PRESCRIBED BY LAW, IN PLACING AN ASSESSMENT MADE BY AN ASSESSING BOARD UPON THE TAX DUPLICATES OF THE DIFFERENT COUNTIES.

We maintain that there is no authority for a court of equity to enjoin any clerical officer from extending assessments for taxation upon the duplicates. There is no authority in the rules of equity whatever for enjoining either the auditor of state or the auditor of a county from performing what the law enjoins upon him. The auditor of state simply certifies down the assessments made by the state board of tax commissioners to the auditors of the counties, and the auditor of the county places such assessment upon the tax duplicates that are to be placed in the hands of the collecting officers.

In our opinion there is not, and never has been, any warrant for any court to enjoin the state board of tax commissioners, or any member of said board, or the auditor of state, from assessing or certifying down to the county auditors the assessment made by the state board of tax commissioners.

Occasionally such proceeding has been had, but in none of the cases where such proceeding has been had, as we understand them, has the question been directly raised and decided by this court.

The wholesale method of blocking the collection of taxes against corporations which follows when an injunction is granted against the auditor of state, has no warrant in

law or precedence, and the result must necessarily be to delay the collection of taxes justly due the state, and the subsidiary corporations.

A few years ago in the state of Indiana a great railroad corporation brought a suit for an injunction against the auditor of state to enjoin him from certifying down the assessments made against such corporation. A temporary restraining order was issued, and millions of dollars of taxable property were thereby kept off the duplicate. Three-fourths of the counties of the state were affected thereby; and many of them were seriously inconvenienced in the performance of their public duties. The taxing officers were delayed in preparing their duplicates, and great inconvenience to the public was experienced thereby—inconvenience and losses which could not be recovered or compensated for, simply because the said company felt that its assessment on some of its lines had been made too high.

So, in the case at bar, this great corporation, the American Express Company, whose capital stock today is worth near fifty millions of dollars; which transacts millions of dollars' worth of business in the state of Indiana every year; which, by the very nature and character of its business, requires and constantly demands the utmost vigilance of the police officers of the state, and the constant protection of the power of its courts; and yet, by this action, it has escaped paying one cent of taxes on this business, except the pittance paid on the bare tangible property, since 1898, a period of nearly four years. This is not

equity. It is not just, and deserves the rebuke of an equitable court.

It was admitted before the tax board—and this admission was before the court below—that the complainant company should be assessed not less than $25 per mile within the state of Indiana, and it was substantially confessed that it should be assessed $138 per mile. (Record, p. 204.)

And yet, because this company is of opinion that it was assessed at too great an amount per mile, it not only refuses to pay the excess, but brings a suit and enjoins the collection of the amount confessedly due. It brings the suit against a state officer, which proceeding, in its nature, exempts the complainant company from the payment of any taxes anywhere in the state of Indiana, except that assessed upon its bare tangible property, for all the years since 1898, although during those years it has constantly demanded of said state protection in the transaction of its business, and invoked, at all times, the aid of the courts in protecting and conserving its rights, notwithstanding it was insisting on its refusal to bear its share of the burdens thus imposed upon the people.

That this is the rule in Indiana is clearly expressed in the case of Smith v. Smith, 159 Ind. 388, where injunction proceedings were brought against the auditor of the county, to enjoin him from placing upon the tax duplicate an assessment made by the state board of tax commissioners and certified down to said county auditor by the auditor of state.

The lower court overruled a demurrer to the complaint, and granted an injunction, and, upon appeal, this judgment of the lower court was reversed upon the ground that the action had been brought prematurely. Speaking to this point, on page 389, the court say:

> "It is the general disposition of the courts to require a careful showing of serious wrong and hardship imminently threatened by the enforcement of the tax, for which there is lacking a plain and adequate remedy at law, to justify the granting of the writ, because it is contrary to public policy unnecessarily to interrupt the ingathering of the public revenues. In Dows v. City of Chicago, supra, it was said by the Supreme Court of the United States, at page 10: 'It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law.'
>
> "The execution of the legislative mandates respecting the assessment and collection of general taxes is intrusted to administrative officers in the

executive department of the government, and the fact that a court, in the exercise of its chancery powers, is wanting in authority to order such officers to proceed, after it has stopped them by its writ, is a reason why this jurisdiction should be exercised only in cases of substantial necessity. 1 High, Injunctions, §487; State Railroad Tax Cases, supra; Pittsburgh, etc., R. Co. v. Board, etc., supra. The observation applies with especial force to applications for the writ against the making of the assessment, since the practical effect of granting writs under such circumstances would often be to relieve from a tax that ought in justice to be paid. * * *

"The question arises whether a party entitled to enjoin a tax sale should not, even where his title is clouded, be compelled to wait until the duplicate containing the objectionable assessment goes into the hands of the treasurer, and he is threatening or about to levy. It is our opinion that in the absence of a showing of an especial necessity for earlier interference he should be compelled thus to wait, because of considerations of public policy. The spreading of the assessment on the duplicate is not what creates the lien, and the objecting taxpayer knows that, in the orderly course of official procedure, the assessment will soon be open to his attack. If he succeeds, his property is relieved of the cloud without unreasonable delay, while if he fails, the assessment is in the hands of the official who is charged with the duty of collection without undue delay. The sale of real estate would cloud the title thereto, and therefore that may be a sufficient reason for enjoining the sale; but after the

assessment is made there would be no ground to interpose to prevent a cloud being cast on the title by putting the assessment on the duplicate, because the title is already clouded to practically the same extent by the making of the assessment. * * *

"But we are persuaded that, in all cases not involving some extraordinary necessity for the earlier issuing of the writ, it ought not to be granted before the duplicate is in the hands of the treasurer, and he is threatening or about to collect the tax. * * *

"It was observed by Frazer, J., speaking for the court in Jones v. Summer, 27 Ind. 510, that 'The decisions of this court heretofore, in restraining the collection of taxes, have gone to the utmost extent of authority.' This is our present view, and while we believe that the courts may properly interfere in favor of a suitor who has just and equitable grounds for an application to stay the hand of the officer who is seeking to enforce a void assessment, yet we think that the courts ought, in all ordinary cases, to balance, so to speak, the demands of the state, that ought not to be delayed in the collection of its revenues, and the claims of a suitor who makes the proper preliminary showing for a temporary restraining order or temporary injunction, and to grant the latter the preventive power of the court only at that stage of the proceedings when his substantial right may be protected, if it turn out that he has one, with the minimum amount of prejudice to the public, if, upon investigation, it turn out that the writ was improvidently issued."

This is the latest expression of the supreme court of Indiana upon this question, and the reasons it presents for the rule therein laid down are so cogent, that is seems to us they should be applied to the present case.

BEFORE A COURT OF EQUITY WILL ENJOIN THE COLLECTION OF A TAX, IT IS NECESSARY FOR THE COMPLAINANT TO PAY, OR MAKE AN UNCONDITIONAL TENDER OF SUCH PART OF THE TAXES AS IS UNDISPUTED, OR WHAT CAN BE SEEN TO BE DUE FROM THE FACE OF THE BILL, OR SHOWN TO BE DUE BY AFFIDAVITS.

State Railroad Tax Cases, 92 U. S. 575, 616, 617;

National Bank v. Kimball, 103 U. S. 732, 733;

Stanley v. Supervisors of Albany, 121 U. S. 535, 552;

Albuquerque Bank v. Perea, 147 U. S. 87, 90;

Northern Pac. R. Co. v. Clark, 153 U. S. 252, 272;

City Council v. Sayre, 65 Ala. 564, 566;

County of Los Angeles v. Ballerino, 99 Cal. 593, 597;

Bundy v. Summerland, 142 Ind. 92, 93;

Morrison v. Jacoby, 114 Ind. 84, 93;

Studabaker v. Studabaker, 152 Ind. 89, 97;

Lewis v. Boguechitto, 76 Miss. 356, 359;

Palmer v. Township, 16 Mich. 176, 178;

County Commrs. v. Union Mining Co., 61 Md. 545, 556;

Ottawa Glass Co. v. McCaleb, 81 Ill. 556, 562;

Northern Pac. R. Co. v. Patterson, 10 Mont. 90, 103;
Welch v. City of Astoria, 26 Ore. 89, 91;
Union Pac. R. Co. v. Ryan, 2 Wyo. 408;
Huntington v. Palmer, 8 Fed. 449;
People's Nat. Bank v. Marye (Advance Sheets, 24 Sup. Ct. Rep. 68, Jan. 1, 1904);
Copper Co. v. Scherr, 50 W. Va. 533, 540;
Covington v. Town of Rockingham, 93 N. C. 134, 140-141;
High on Injunctions (3d ed.), §497;
2 Beach on Injunctions, §1208;
1 Spelling Inj. and Extra. Rem. (2d ed.), §662;
2 Cooley on Taxation (3d ed.), 1424-1426;
State, ex rel., v. Western Union Tel. Co., 165 Mo. 502, 517.

In State Railroad Tax Cases, 92 U. S. 575, on page 616, Mr. Justice Miller, speaking for the court, says:

> "But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.
>
> "The defendants in all these cases are the clerks and treasurers of the counties—the clerk who makes out the tax list, and the treasurer who collects the taxes. These taxes are both the state and county taxes. It is clear, from the statements of the bills and from what we have already said, that there must be in every county mentioned a consid-

erable amount of real estate and personal property coming within the character of local tangible property, and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the road-bed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their road-bed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large a valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing and escape wholly because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

"It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction."

In National Bank v. Kimball, 103 U. S. 732, it was held that the owner of taxable property who seeks to enjoin the collection of a tax thereon which he alleges to be in excess of what is lawful, must first pay or tender so much thereof as is justly due. Citing and following the decision in State Railroad Tax Cases, 92 U. S. 575.

In Stanley v. Supervisors of Albany, 121 U. S. 535, on page 552, Mr. Justice Field, speaking for the court, says:

> "If the assignors of the plaintiff had any just grounds of complaint to the assessment as excessive, they should have pursued the course provided by statute for its correction or resorted to equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they conceded to be a just valuation."

In Albuquerque v. Perea, 147 U. S. 87, it was held that in order to procure an injunction restraining the collection of a tax, it is necessary to pay or offer to pay such parts of the sums assessed as is not disputed. Following State Railroad Tax Cases, 92 U. S. 575, 616.

In Northern Pacific Railroad Co. v. Clark, 153 U. S. 252, Mr. Justice Jackson, speaking for the court, on page 272, says:

> "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the taxes assessed against him as it can be plainly

seen he ought to pay. Applying this rule to the present case, it is clear that the applicant's bill was properly dismissed for failing to pay or tender to pay taxes which he ought to have paid on his property or in lieu thereof, a percentage of its gross earnings. Our response therefore to the eighth question certified is, that the bill was without equity because of the failure to aver that the plaintiff had tendered or paid the gross earnings percentage for the year 1889 (or the tax assessed by the county auditors), and was not entitled to the equitable relief prayed without first tendering or paying such taxes."

In City Council v. Sayre, 65 Ala. 564, the court say:

"It is apparent that if all the objections to the tax assessed could be sustained, there remains a considerable amount which is justly due and ought to have been paid. There is no averment in the bill that the complainants made any effort to procure a separation of the taxes confessedly legal from those which are supposed to be illegal; nor was there any tender of payment; nor is there in the bill an offer to pay. We quote and adopt the language of the supreme court of the United States in State Railroad Tax Cases, 92 U. S. 616, 'Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they seek equity relief they should do that justice which is necessary to enable the court to hear them. It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all of their taxes, contest the case through several years of

litigation and when in the end it is found that but a small part of the taxes should be permanently enjoined, submit to pay the balance. This is not equity. It is indirect violation of the principles of equity jurisdiction.' If bills of this kind could be entertained, municipal corporations would be placed at the mercy of the reluctant and litigious taxpayers, embarrassed in all their operations and incapable of preserving the peace, order and proper government of the localities to which their powers extend."

In County of Los Angeles v. Ballerino, 99 Cal. 593, 597, the court say:

"In appealing to a court of equity for relief by way of injunction against such fraudulent assessment, the plaintiff must show by his complaint that he has paid or tendered the amount of taxes which would have been due from him if his property had been assessed at what he concedes would have been a fair valuation, and he must in addition offer to pay what the court shall find to be equitable and just (cite authorities); and we think the same facts should appear in an answer which seeks to defend against the collection of a tax on the ground of a fraudulent assessment. Tested by this requirement the answer of defendant fails to state facts sufficient to constitute an equitable defense to this action growing out of such alleged fraudulent assessment. It contains no allegation that defendant ever paid or offered to pay what would have been right for him to pay upon what he concedes would have been a fair valuation of

his property, nor does he offer to pay what the court shall ascertain to be just, and for this reason there was no error in excluding the evidence offered by him tending to prove the matters alleged in his answer."

In Bundy v. Summerland, 142 Ind. 92, on page 93, the court say:

"It is settled in this state that if a part of the tax charged on the duplicate against a party be legal and a part illegal, that which is legal must be first paid or tendered to the treasurer before an action to enjoin the collection of the residue can be maintained. * * * The rule requiring the taxpayer to pay or tender all taxes due upon property owned by him, which is subject to taxation before he can enjoin the taxes claimed to be illegal, is a just and salutary one and should be strictly enforced. When a tender is made to a county treasurer and is refused, the same must be kept good by paying into court when the complaint is filed, the amount legally due for taxes. This must be alleged in the complaint or the same will not be sufficient to withstand a demurrer for want of facts."

In Studabaker v. Studabaker, 152 Ind. 89, 97, the court say:

"If any portion of a tax in question is invalid, the part thereof which is valid ought to have been paid or a tender of the money in payment thereof ought to have been made before an action to enjoin the collection of the residue could be main-

> tained, and such tender, if refused, must be kept good by paying the money into court. These facts in such cases must be alleged in the complaint, or it will not be sufficient to repel a demurrer."

In Huntington v. Palmer, 8 Fed. 449, it was held that where a stockholder on behalf of himself and all others who should come and contribute to the expense of the suit, brought a bill in equity against the corporation and the tax collector to enjoin the collection of a state and county tax, as being illegal and unconstitutional and as such utterly void, that as the bill did not allege payment of so much of the taxes as must be conceded ought to be assessed and paid, it was demurrable, and an averment in the bill of a readiness to make such payment is not sufficient.

Mr. High in his work on injunctions says:

> "No principle of the law of injunctions is more firmly established than that requiring a taxpayer who seeks aid of an injunction against the enforcement or collection of a tax, to first pay or tender the amount which is conceded to be legally and properly due. Applying the maxim that he who would have equity must first do equity, the courts have almost uniformly required where a definite portion of the taxes was conceded to be justly due and payable, that the complaining taxpayer should first pay or tender the amount admitted to be due before extending preventive relief by injunction as to the residue. Where therefore complainant has not paid that portion of the tax which is clearly valid, to which no objection is offered and which

may readily be distinguished from the illegal portion, the injunction will be denied, since the collection of a legal tax will never be restrained to prevent the enforcement of an illegal one, and since a court of equity will not lend its extraordinary aid by injunction to one who himself refuses to do equity. And in all such cases the bill itself must show what portion of the tax is legal and what illegal in order that the court may be enabled to properly discriminate between them and to determine what portion of the entire tax should be paid and what enjoined." 1 High on Injunction (3d ed.), sec. 497.

See also Western Union Tel. Co. v. Gottlieb, 190 U. S. 412, 426-427.

IT IS NOT SUFFICIENT TO SAY IN THE BILL THAT THEY ARE READY AND WILLING TO PAY WHATEVER MAY BE FOUND DUE. THEY MUST PAY WHAT IS CONCEDED TO BE DUE OR WHAT CAN BE SEEN WOULD BE DUE ON THE FACE OF THE BILL OR BE SHOWN BY AFFIDAVITS WHETHER CONCEDED OR NOT, BEFORE THE PRELIMINARY INJUNCTION SHOULD BE GRANTED.

In State Railroad Tax Cases, 92 U. S. 575, on page 617, Mr. Justice Miller, speaking for the court, says:

> "It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied

> up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed. We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity, as a rule to govern the courts of the United States in their action in such cases.

In Albuquerque v. Perea, 147 U. S. 87, on page 90, Mr. Justice Brewer, speaking for the court, says:

> "With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes; an allegation which is manifestly untrue in view of the fact that it had no difficulty in making the separation of the taxes of 1888, the assessment for which was made in a similar way; and in view of the further fact that it must have known what property it had which was subject to taxation as well as its value, and therefore the rate of taxation being fixed by law, it could of course have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court." Citing and following State Railroad Tax Cases, 92 U. S. 575, 616.

In Hagaman v. Commissioners, 19 Kansas 394, 395, the court say:

> "By the repeated decisions of this court the plaintiff is not rightly entitled to the relief demanded until he has done that justice, or offered to do it, which he exacts from others. He who seeks equity must do equity. The action of the court in sustaining the demurrer was correct. (Citing authorities.) To the suggestion of counsel for the plaintiff that if the court found any of the taxes illegal the judgment should have been for the plaintiff, conditioned upon his paying the legal taxes, not that he had no case in court, we can not better reply than by using the forceful language of Mr. Justice Miller in Bailey v. A. & P. R. Co., C. L. J., Vol. I, 502, that, 'whenever parties come into this court to ask this court to enjoin the collection of taxes or the collection of part of a tax, if there is any part which they admit to be due or just or which the court can see in the statement made in the bill, ought to be paid, there must be an allegation in the bill conforming to the fact, that they have paid it, or that they have tendered it; and it is not a sufficient allegation to come and say that we are willing or even that we have paid it into the court, because the state is not to be stayed in its revenue which is admitted to be due in that way; and a party claiming that he will not pay his taxes, or any portion of them, can not screen himself during the course of a long litigation from paying that which must be paid and which everybody can see must be paid, by setting up a con-

test over that which is doubtful and which may or may not be necessary to be paid.'"

In County Commissioners v. Union Mining Co., 61 Md. 545, 557, the court say:

"It being according to our view, conceded by the demurrer, that the increase from $250,000 to $273,450 was made without proper notice, the levy and collection of the tax on this difference of $23,450 is illegal and void.

"From all we can gather from the bill, the change from $200,000 to $250,000, first made, although made without notice, was acquiesced in by the appellee and the taxes paid thereon, and therefore is not now before us but only the taxes levied on the property after the last change, but notwithstanding this, the appellee was not entitled to the injunction to the extent that it was granted. The taxes on the $250,000 were due and ought to have been paid or tendered unconditionally and the fact have been so averred in the bill.

"In State Railroad Tax Cases, 92 U. S. 617, the supreme court says: 'It is not sufficient to say in the bill that they (the complainants) are ready and willing to pay whatever may be found due; they must first pay what is conceded to be due or what can be seen to be due on the face of the bill or be shown by affidavits whether conceded or not before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the

proper officer refuses to receive a part of the taxes, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.' In this case there was no actual tender, but only a professed willingness to pay an *uncertain* sum."

In Chicago, etc., R. R. Co. v. Board, 67 Fed. 413, Judge Caldwell, speaking for the court, said:

"In the federal courts, no one can enjoin the collection of a tax until he has paid or made an unconditional tender of so much of the tax assessed against him as can be plainly seen he ought to pay. State Railroad Tax Cases, 92 U. S. 575, 616, 617; Bank v. Kimball, 103 U. S. 732. The tender made by the appellant in this case was not sufficient, and when advised of the insufficiency of the tender by record evidence of the valuation by the county assessors of all other property in the county for taxation, it merely amended its bill offering to do equity. This was not a compliance with the rule. It should have paid or tendered unconditionally an amount of tax equal to that assessed on other property in the county. An averment of readiness to pay or a tender made in the bill is not sufficient in this class of cases. The tender must be made to the officer authorized to collect the taxes. It must be actual and unconditional and made in money or in evidence of indebtedness of the county which by law of the state is made a legal tender in the payment of the taxes."

See—

State Railroad Tax Cases, 92 U. S. 575, 617;
Albuquerque Bank v. Perea, 147 U.S. 87, 90;
Morrison v. Jacoby, 114 Ind. 84, 99;
Hagaman v. Commissioners, 19 Kan. 394, 395;
County Commissioners v. Union Mining Co., 61 Md. 545, 557;
Chicago, etc., R. Co. v. Board, 67 Fed. 413.

In the case of People's National Bank of Lynchburg v. Marye, decided November 30, 1903, and found in No. 3, vol. 24, Supreme Court Reporter, 68, this question was thoroughly considered and reviewed by this court. In that case an injunction suit had been brought to restrain the collection of taxes on shares of stock in a national bank, on the ground that such taxes were illegally laid, and, after a full consideration of the case, this court held, in substance, that the payment—or, at least a tender—of the amount of the taxes shown from the bill on complainant's own theory, justly and equitably to be due, must be made before a court of equity will interfere by injunction with their collection.

Mr. Justice Peckham, speaking to this point, for the court, on page 70 of the opinion as found in such Reporter, says:

> "From this it appears there has, in fact, never been any payment or tender of any part of the taxes assessed against the shareholders during the years above mentioned, and the omission of an

averment of payment, or tender of payment, was, therefore, not a mere oversight.

"In our view of the facts set forth in this case in the original and supplemental bills, the complainant was not entitled to any injunction unless it paid the amount equitably due; and if it made such payment, then the injunction would issue, restraining the collection of the balance. This is, of course, upon the assumption that the objections taken to the acts as above set forth are well founded. * * *

"The original and supplemental bills, taken together, show at least the amount that would be justly and equitably due on the theory of the complainant, for they show that if the two deductions (being all that are insisted upon by the complainant) had been made by the taxing officer, the complainant would not have had any ground of complaint as to the amount of the taxes. There are data in the original and supplemental bills from which it can be at once and definitely determined what the amount of the deductions claimed by complainant would be. The market value of the stock is stated for each year, as assessed by the taxing officer, and also the value of the real estate is stated for each year, and this last amount, complainant insists, should be deducted in arriving at the market value of the stock. The bills also show the different shareholders who had debts at the time the various assessments were made, and the amounts of the deductions they would, therefore, be entitled to for each of the years in controversy. These two classes of deductions being made, the complainant offers no equitable objection to taxes

which might be assessed upon the balance. With these data thus appearing, from which the equitable amount of the taxes due by the shareholders is readily determined, we think this conceded amount should be paid before a court of equity ought to grant its aid by way of injunction. The universal rule of a court of equity is that he who seeks its equitable interposition must himself do equity. Is there any higher equity than that a citizen should pay the amount of a tax which he concedes to be just and equitable, before asking the aid of a court of equity to grant an injunction to enjoin the collection of any greater sum?

"The complainant, however, insists that the rule does not exist where the assessments are void, and not merely irregular; and it asserts that these assessments are void because the acts under which they were laid do not provide for notice to the shareholder before determining the value of the share upon which the tax is to be laid, and also because the assessment violated the act of congress in being at a greater rate than is assessed upon other moneyed capital.

"We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction, because there could be no

amount equitably due where there never had been a right to assess at all. Where, however, there is a statute which provides for an assessment, and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid for want of a notice to the taxpayer, or some other kindred objection, the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property, before he can ask the aid of the chancellor to enjoin the collection of the balance. This is the equitable rule, and it is good morals as well. To say that the act under which the tax is levied is unconstitutional, and therefore is the same as no law, and hence there is no duty to pay anything, because no tax can be levied without some law therefor, is to state the proposition too broadly. We concede that if the law were unconstitutional because, for instance, there was no constitutional power to tax the particular property, there is no necessity to pay anything. But where some part of the law may be unconstitutional because of a failure to comply with some matter of detail, but the amount which the owner of the property ought to pay is perfectly clear under the provisions of law, then if the taxpayer desire to be exempted from paying more than his share, he must pay or offer to pay his proportion, before equity will aid him in his effort to escape paying a disproportionate share.

"The statute herein provides for a tax and creates the equitable obligation to pay some amount by reason of the shares, and even though there may be some obstacle which prevents its entire legality,

yet the person assessed should recognize his equitable obligation to pay the tax to the extent stated, before he can base any claim for the assistance of equity to get rid of the balance of the tax. The mere lack of a provision in the statute for notice did not take away the jurisdiction of the taxing officer to make an assessment under any circumstances.

"What is the purpose of notice? Clearly, that the person assessed may have an opportunity to show some reason, if any, why he should not be assessed at all, or else not so much as he has been in fact. But suppose that, although there was no notice provided for in the act, the taxpayer had nevertheless heard of the assessment, and in fact had appeared before the assessing officer and made his case, showing he should not be assessed more than a certain stated amount, and the officer had allowed his claim to its full extent. Should he be thereafter permitted to resist by means of an injunction the collection of the tax so imposed, upon the ground that the statute provided for no notice to him, and none was officially given? Certainly not. So, when he comes into a court of equity to ask its aid, should it appear, on his own statement or otherwise, that if all the claims he makes were allowed he would still equitably owe the government a certain sum by reason of the statute providing for the assessment and his ownership of the property assessed, will he be heard to insist that the court grant him an injunction preventing the collection of any tax, because he had no notice of the assessment? He owes something to the government as a tax upon his shares, and

> ought any court of equity to aid him in escaping all obligation because, while insisting that the whole assessment is illegal, it yet clearly appears that a portion thereof, even if uncollectible, is nevertheless equitably and justly due. Is the equitable obligation arising by reason of these statutes and under these circumstances, to pay *some* tax, completely obliterated because the particular tax can not legally be collected, and may be called void? We think clearly not. This same reason applies not only to a lack of notice, but also to the case of a claim that the tax is illegal because it did not allow the deductions which by the Federal statute should have been allowed. The tax under such circumstances is not void, but, at most, voidable for the illegal amount. Albany County v. Stanley, 105 U. S. 305, 315, 26 L. ed. 1044, 1051."

The learned Justice then takes up and considers a number of cases bearing upon this question, all sustaining the principles above enunciated, and, after considering the same, makes the application in the following language:

> "In the case at bar because certain deductions were not made, although there was a large sum assessable even if the deductions were allowed, the injunction granted has prevented the collection of any part of the assessments, and for twelve years the stockholders in these Lynchburg banks have paid not one dollar of taxes by reason of their ownership of such shares. This is inequitable and unjust, and a court of equity should not be made the instrument by which such injustice is continued."

A case like the one at bar is not like a case between individuals, where a suit is in the nature of a truce, and each may remain in statu quo while the question at issue is being settled.

Here, it stays the hand of a sovereign from enforcing the performance of a duty entailed upon one of its citizens, while the citizen continues to demand, and continues to receive, the protection and safe conduct, and the use of all the machinery of the law he would have received had he fully performed his whole duty.

It is a one-sided truce, and should not be countenanced, except in extreme cases, where the sovereign, in flagrant abuse of power and utter disregard of the rights of its citizens, is endeavoring to commit a palpable wrong.

THE STATE BOARD OF TAX COMMISSIONERS, HAVING FIXED THE VALUATION AND ASSESSED THE PROPERTY, THEIR ACTION IN THIS BEHALF IS FINAL, AND CAN NOT BE AVOIDED OR SET ASIDE, EXCEPT FOR FRAUD ON THE PART OF THE STATE BOARD OF TAX COMMISSIONERS, WHICH WOULD RENDER THE ASSESSMENT VOID.

The law providing for the assessment of lines and routes of express companies contemplates a complete system of taxation of this class of property, and, for the information of the court, we quote the sections of the act of the legislature of 1893, herein referred to, which apply directly to the assessment of express companies:

> Sec. 3. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other state, or

any foreign nation engaged in conveying to, from, through, in or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, freight or other articles, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, provided such joint stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall annually, between the first day of April and the first day of June, make out and deliver to the auditor of state a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement with reference to the first day of April next preceding, showing:

First. The total capital stock or capital of said association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding and the par or face value of each share, and, in case no shares of capital stock are issued, in what manner the capital thereof is divided and in what manner such holdings are evidenced.

Third. Its principal place of business.

Fourth. The market value of the said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state of Indiana, and the location and assessed value thereof in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the improvements thereon, owned by said association, company, copartnership or corporation, situate outside the state of Indiana and not used directly in the conduct of the business, with a specific description of each piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Eighth. (a) The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight or express matter.

(b) The total length of such lines or routes as are outside the state of Indiana.

(c) The length of such lines or routes within each of the counties and townships within the state of Indiana.

Sec. 5. Upon the filing of such statements the auditor of state shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make such other and further statements as said auditor of

state may call for. In case of the failure or refusal of any association, company, copartnership or corporation to make out and deliver to the auditor of state any statement or statements required by this act, such association, company, copartnership or corporation shall forfeit and pay to the state of Indiana one hundred ($100) dollars for each additional day such report is delayed beyond the first day of June, to be sued and recovered in any proper form of action in the name of the state of Indiana on the relation of the auditor of state, and such penalty, when collected, shall be paid into the general fund of the state.

Sec. 6. Upon the meeting of the state board of tax commissioners for the purpose of assessing railroad and other property, said auditor of state shall lay such statements, with such information as may have been furnished him, before said board of tax commissioners, who shall thereupon value and assess the property of each association, company, copartnership or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership or corporation to appear before them with such books, papers or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses, in case they shall deem it necessary, to enable them to ascertain the true cash value of such property.

Sec. 7. Said state board of tax commissioners

shall first ascertain the true cash value of the entire property owned by said association, company, copartnership or corporation from said statements or otherwise, for that purpose taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership or corporation, in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole, or any portion of the property of such association, company, copartnership or corporation shall be incumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership or corporation. Such board of tax commissioners shall, for the purpose of ascertaining the true vash value of the property within the state of Indiana, next ascertain from such statements or otherwise, the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situate without the state of Indiana and not specifically used in the general business of such associations, companies, copartnerships or corporations, which said assessed values for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of tax commissioners

shall next ascertain and assess the true cash value of the property of such associations, companies, copartnerships or corporations within the state of Indiana, by taking the proportion of the whole aggregate value of said associations, companies, copartnerships or corporations, as above ascertained, after deducting the assessed value of such real estate without the state, which the length of the lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies within the state of Indiana, bears to the total length of the lines thereof; and in the case of palace, drawing-room, sleeping, dining or chair-car companies, the proportion shall be the proportion of such aggregate value, after such deductions, which the length of the lines within the state, over which said cars are run, bears to the length of the whole lines over which said cars are run; and in the case of express companies, the proportion shall be the proportion of the whole aggregate value, after such deductions, which the length of the lines or routes, within the state of Indiana, bears to the whole length of the lines or routes of such associations, companies, copartnerships or corporations, and such amount, so ascertained, shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the state of Indiana. From the entire value of the property within the state so ascertained, there shall be deducted, by said board, the assessed value for taxation of all the real estate, structures, machinery and appliances within the state and subject to local taxation in the counties and townships, as herein-

before described in item No. 5 of sections 1, 2, 3 and 4 of this act, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said association.

Sec. 8. Said state board of tax commissioners shall thereupon ascertain the value per mile of the property within the state by dividing the total value, as above ascertained, after deducting the specific properties locally assessed within the state by the number of miles within the state, and the result shall be deemed and held as the value per mile of the property of such association, company, copartnership or corporation within the state of Indiana.

Sec. 9. Said state board of tax commissioners shall thereupon for the purpose of determining what amount shall be assessed by it to said association, company, copartnership or corporation in each county in the state, through, across, into or over which the line of said association, company, copartnership or corporation extends, multiply the value per mile as above ascertained by the number of miles in each of such counties as reported in said statements, or as otherwise ascertained, and the result thereof shall be by said board certified to the auditor of state, who shall thereupon certify the same to the auditors respectively of the several counties through, into, over or across which the lines or routes of said association, company, copartnership or corporation extend, and such auditors shall apportion the amount certified for their counties respectively among the several townships into, through over or across which such lines or

routes extend in proportion to the length of the lines in such townships.

Under the foregoing statutes, the validity of which has been frequently upheld and is not here questioned, after the filing of the statements, as therein provided, upon the convening of the board, said board "shall, thereupon, value and assess the property of said association * * * after examining said statements, and after ascertaining the value of such properties therefrom, *and from such other information as they may have or obtain.*"

Here the board is given full power to "value and assess." Ample opportunity is given the company or association to present its side of the case, but the board is not bound by such statements or information. If not satisfied, it may seek elsewhere and obtain all the information it desires, and, upon this information it must render judgment and value and assess and ascertain the true cash value of its property.

This proposition is directly upheld in the case of State v. Adams Express Company, 144 Ind. 549, on page 556, where the court say:

> "The state board of tax commissioners is not confined for its information as to the value of property to be assessed to the statements mentioned. Section 6 (R. S. 1894, section 8483) authorizes them to resort to 'such other information as they may have or obtain' for that purpose.
>
> "So that we see that it is not true that the assessment of so much per mile on the whole number of miles of the route of each company in this state

was made on a myth; that the appellees claim that such assessment was not made in respect to any property belonging to them in the state of Indiana is wholly unfounded in fact or law. On the contrary, it was made upon that portion of the whole property belong to each of the companies that was used in the prosecution of their business in the state of Indiana; and its value was fixed and ascertained by apportioning such a part of the value of the whole property as the proportion thereof in this state bore to the whole property."

That the board shall seek evidence and render judgment is emphasized in section seven, where it is provided:

> "Said state board of tax commissioners shall first ascertain the true cash value of the entire property owned by said association * * * from said statements *or otherwise*.

Then the state board shall ascertain from such statements *or otherwise* the assessed value for taxation of the several pieces of real estate situate without the state and not specifically used in the general business of such association; which said assessed value for taxation shall be by said board deducted from the gross value of the property *as above ascertained*. After this deduction the value in the state shall be ascertained by taking the proportion of the whole aggregate value of such associations, after such deductions, which the length of lines or routes within the state of Indiana bears to the whole length of the lines or routes of such associations. And from the entire value

of the property within the state, so ascertained, there shall be deducted the assessed value for taxation of all the real estate, structures, machinery and appliances within the state, subject to local taxation in the counties and townships.

This plan of taxation is fair and just. If such a plan were followed in all the taxing jurisdictions in which appellant has lines and routes, appellant would not be subject to excessive or double taxation.

UNDER THESE PROVISIONS OF THE STATUTE THE STATE BOARD OF TAX COMMISSIONERS ARE GIVEN JURISDICTION OVER THE SUBJECT MATTER, TO VALUE AND ASSESS THE MILEAGE OF THE EXPRESS COMPANIES HAVING LINES AND ROUTES WITHIN SAID STATE. ACTING UNDER THIS AUTHORITY, THEY DID MAKE SUCH ASSESSMENT AND RENDER THEIR FINDING, WHICH, IN ITS NATURE, IS THAT OF A JUDGMENT, AND IS FINAL. ESPECIALLY IS THIS TRUE AS AGAINST A COLLATERAL ATTACK.

In the case of Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Backus, 133 Ind. 513, the question of the constitutionality of the act now before the court was presented; also the question of the finality of the decision of the state board of tax commissioners when assessing property over which it had jurisdiction, and, on page 541, the court say:

> "The state board having fixed the valuation and assessed the property, their action in this behalf is final, and can not be avoided or set aside, except for fraud on the part of the state board of tax commissioners, which would render the assessment void. Fraud vitiates even the most solemn judicial

proceedings, and would likewise vitiate the proceedings of any tribunal created for the purpose of determining the rights of parties; but we do not think it can be seriously contended that the proceedings in this case seek to attack or avoid the valuation or assessment made by the state board, of appellant's property, on the ground that the state board was guilty of fraud, or acted corruptly in the discharge of its duties in the appraisement and assessment of the property of railway companies; and, if it were so contended, the averments of the complaint fall far short of being sufficient to present such a question.

"What we have said disposes of the major portions of the questions presented in the case. The court having no power to review the proceedings, the action of the state board being final, no right of action existed to set it aside, except for fraud, and it not being attacked on that ground, no evidence was admissible, for it is a well settled rule that the courts have no power to give any relief against erroneous assessments of such boards, except they are given such power by statute, and no such power is given in this state. Cooley on Taxation, p. 748, and authorities there cited; Bass v. City of Ft. Wayne, 121 Ind. 389; Sims v. Hines, 121 Ind. 534; McCollum v. Uhl, 128 Ind. 304; Central, etc., Gravel Road Co. v. Black, 32 Ind. 468.

"The court could not inquire into the evidence upon which the board made its assessment and determine as to whether such board arrived at just valuations or not. The board has passed upon that question, and with its adjudication the matter ends.

> The decision of the state board being final, the record of that board required to be kept by the law, section 121 of the act of 1891, is conclusive."

And in the case of P., C., C. & St. L. Ry. Company v. Backus et al., 133 Ind. 625, where the same act and the same question were before the court, the same doctrine is reiterated. On page 652, speaking to this point, the court say:

> "The state board having fixed the valuation and assessed the property, their action in this behalf is final, and can not be avoided or set aside except for fraud on the part of the state board of tax commissioners, which would render the decision void. * * *
>
> "The court having no power to review the proceedings, the action of the state board being final, no right of action existed to set it aside except for fraud, and, it not being attacked on that ground, no evidence was admissible; for it is a well settled rule that the courts have no power to give any relief against erroneous assessments of such boards, except they are given such power by statute, and no such power is given in this state."

In the case of Youngstown Bridge Co. v. Kentucky & I. Bridge Co. et al., 64 Fed. 441, the facts were that taxes had been assessed upon a bridge across the Ohio river, a portion of which bridge was within the county of Floyd and state of Indiana, and a portion thereof in the state of Kentucky. The state board of tax commissioners assessed to the owner of said bridge an amount,

as was alleged, greatly in excess of the value of the bridge within the state of Indiana.

There was no question but what the state board of tax commissioners had jurisdiction over a portion of said bridge, and had authority to tax a portion thereof to the owners. The opinion is an exhaustive one, rendered by a judge of wide experience and studious investigation of the Indiana laws, one who had spent his life in the practice and on the bench in Indiana, and we desire to quote from it at length, feeling that this opinion should have much weight with this court. Judge Baker, on page 441, says:

> "It is the settled law of this state that the state board of tax commissioners is not a judicial tribunal, within the meaning of the constitution, and that it has only such quasi judicial powers as are possessed by every public officer vested with discretionary power; but when, in the exercise of its quasi judicial power, it has fixed the value of property falling within its jurisdiction, and has assessed such property, its action in that behalf is final, and can not be avoided or set aside, except for fraud on the part of the board. Railway Co. v. Backus, 133 Ind. 513, 33 N. E. 421. Upon its face, the assessment in question appears to be within the jurisdiction of the board. It professes to be an assessment made upon the property of the bridge company in Floyd county, in the state of Indiana. It is conceded that a portion of the property assessed is located in the state of Indiana, but it is insisted that the board did not confine its assessment to the property in this state, but in-

cluded therewith property of the bridge company located in Kentucky. The precise question for decision, then, comes down to this: The board, professing to assess property in this state, by mistake, erroneously assessed some proportion of the bridge property actually located in Kentucky as though located within the state of Indiana. Jurisdiction is the power to hear and decide. The board is vested with the power to hear and decide, not only on the value of taxable property, but it must necessarily have the power to hear and decide what property is properly assessable. Its decision is no more void when it decides erroneously than when it decides correctly. It is of the essence of the power to hear and decide that the determination may be erroneous as well as correct. To hold that jurisdiction is lost because of an erroneous decision would be to overturn principles as ancient and venerable as the law itself. Before the board can lawfully fix an assessment, it must determine that the property about to be assessed is the proper subject of assessment, and also the value which ought to be placed upon it for purposes of taxation. The determination of the one is not more within its rightful jurisdiction than the determination of the other. Every fact necessary to support the decision of the board is as conclusively settled against collateral attack as though expressly found by it. 'Absolute nullities in judicial proceedings,' says the supreme court of Louisiana in Stackhouse v. Zuntz, 36 La. Ann. 529, 533, 'are such as result from radical defects, omissions, and irregularities appearing on the face of the record, and are not dependent on matters en pais to be established ali-

unde.' So the doctrine that a judgment appearing to be valid on its face can not be contradicted by evidence aliunde, or by matters dehors the record, has been expressly decided in Indiana, in Earle v. Earle, 91 Ind. 27, 42; Phillips v. Lewis, 109 Ind. 62, 68, 9 N. E. 395; Kingman v. Paulson, 126 Ind. 507, 26 N. E. 393; in Colorado, in Hughes v. Cummings, 7 Colo. 203, 2 Pac. 928; in Missouri, in Scott v. Crews, 72 Mo. 261, 263; in Tennessee, in Byram v. McDowell, 83 Tenn. 581, 585; Stanley v. Sharp, 48 Tenn. 417; in Vermont, in Beech v. Rich, 13 Vt. 595; in Wyoming, in ex parte Bergman, 26 Pac. 914, 919. And the supreme courts of Illinois and Vermont have ruled that it can not be controverted by plea. Wellborn v. People, 76 Ill. 516; Beech v. Rich, supra. As taxing officers act judicially, and have general and exclusive jurisdiction over assessments for purposes of taxation, an error in assessing exempt property does not render the assessment void. So it was held in Louisiana concerning an assessment on a schoolhouse owned by a church which was exempt by law. First Presbyterian Church v. City of New Orleans, 30 La. Ann. 259. It was held in Minnesota that a tax judicially assessed is not void because the land was exempt (County of Chicago v. St. Paul & D. R. Co., 27 Minn. 109, 6 N. W. 454); and the same ruling was made in England in respect to an assessment of a poor rate to the occupier of land, exempt because it belonged to a literary society (Birmingham v. Shaw, 10 Adol. & E. (N. S.) 868, 880, 59 E. C. L. 867, 879). The record of the state board of tax commissioners can not be contradicted, varied, or ex-

plained by evidence aliunde, touching any matter whose decision is committed to it, any more than can the record of a court of general jurisdiction. Railway Co. v. Backus, supra. And it is clear, beyond dispute, that among the things expressly committed to it is the determination of what property is properly subject to assessment by it. This is the first question which it must determine in the exercise of its jurisdiction. Some tribunal must be intrusted with this power, and the legislature has confided it to a board composed of the most eminent personages in the state. The power is an important and delicate one, which can not be administered with unerring certainty in every case, but its determinations are as likely to be unmixed with error and partiality as any other tribunal to which these questions could be committed. In the absence of fraud, the citizen who is aggrieved by its erroneous judgments must submit, without remedy."

This case was appealed to the circuit court of appeals of the seventh circuit, and an opinion given thereon, which is found under the title of McLeod et al. v. Receveur, 71 Fed. 455. The facts are closely reviewed, and the opinion of Judge Baker upheld. Judge Jenkins, speaking for the court, on page 458, says:

"It is, no doubt, true, as urged by the counsel for the appellants, that a judgment pronounced by a tribunal having no authority to determine a matter in issue is necessarily and incurably void, and that such want of jurisdiction may be shown in any collateral or other proceeding in which it is

drawn in question. That principle, however, has no proper relation to the case in hand, because it is undenied and undeniable that the board of equalization had the power to assess, and the state of Indiana and the county of Floyd had lawful right to tax the property of the bridge company lying within the county of Floyd. The officers of the board of equalization, in estimating the value of property for taxation, act judicially. Their judgments in cases within their jurisdiction, in the absence of fraud, are not open to collateral attack. They can only be impeached in a direct proceeding. * * * It is, in effect, charged that they committed an error of judgment, being misled to believe that the boundary line of the state was below low-water mark in the Ohio river, and so placed upon the property lying within the state a greater valuation than they otherwise would have done; in other words, that, through a mistake of fact and error of judgment, the property of the bridge company lying within the state was excessively valued. The board of equalization had, however, jurisdiction of the subject-matter, and, as observed by Chief Justice Ryan, 'had jurisdiction to commit the error;' and its determination, however erroneous, can not be impugned collaterally. Jurisdiction existing, any order or judgment is conclusive in respect of its own validity in a dispute concerning any right or title to be derived through, or anything done by virtue of, its authority. * * *

"The law of Indiana does not seem to afford a remedy to the property owner by review of the action of the board of equalization to avoid an assessment unjust because above the real value of the

> property. The board met at stated times, regulated by law, and all parties in interest had the right to appear before the board, and to be heard; and as a matter of fact, the bridge company appeared before the board, and was heard. This is sufficient to meet the constitutional requirement that one shall not be deprived of his property without due process of law. Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750. It is not essential that a right of appeal to the courts should be provided."

In Stanley v. Supervisors of Albany, 11 U. S. 535, where the question of taxing shares of a national bank was presented, the shares had been assessed by the assessors, and such assessment had not been appealed to the board of review, as required by the statute, but proceedings were brought to recover taxes that were so paid on such assessment alleged to be wrongful. Mr. Justice Field, speaking for the court, on page 550, says:

> "In nearly all the states, probally in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all hu-

man evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with when designed and manifest departures from the rule are avoided.

"To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment can not be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.

"When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a

> court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due."

In the case of Adams Express Co. v. Ohio, 165 U. S. 194, where a question similar to the question now before the court was presented, Mr. Chief Justice Fuller, speaking for the court on the question of excessive valuation, on page 229, says:

> "We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it can not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined."

In the case of Maish v. Arizona, 164 U. S. 599, suit was brought in the district court of the territory of Arizona, for the recovery of delinquent taxes, on the ground that the delinquent list was incorrectly published, and the further ground that the taxes were illegally assessed; that the board of equalization had raised the value of the property arbitrarily, and without notice or evidence; that such assessment was grossly unfair. Mr. Justice Brewer, speaking for the court upon this point, on page 610, says:

> "There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown, something indicating fraud or misconduct. * * * It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment can not be overthrown."

In the case of Van Nort's Appeal, 121 Pa. St. 118, on page 129, the court say:

> "The fraud which may be urged against the assessment must, in general terms, have either consisted in a wilful disregard, by the members of the board, of a known duty, for the purpose of producing a result which could not otherwise have been produced, or in their denying or preventing the taxpayer from doing something that he might

> lawfully do, and, but for being denied and prevented by them, would have done, which would or might have had the effect to have caused a lower valuation of the property to be made."

Counsel, in support of their contention that this judgment of the tax board may be thus assailed, cite the case of Hart v. Smith, 159 Ind. 182. But in that case it was averred that the tangible property was given in and assessed at $47,657.41, which was its true cash value, and that the increase of $352,340 added by the state board of tax commissioners, was upon the good will, an element or species of property, under the laws of that state, over which the state board had no jurisdiction; this bill was demurred to, which, in effect, admitted all the allegations in relation thereto to be true. Neither of the parties to the suit presented the technical question, preferring to have the case determined on the merits; but an *amicus curae* filed a brief by leave of court, raising the question.

This is clearly shown by the following language of the court, found on page 195 of the opinion:

> "The questions involved in this case that have been argued by the respective parties have been questions that went to the merits of the state board of tax commissioners to tax the appellees, and, as the parties stand in the attitude of waiving all other questions, we have been disposed to consider, so far as we could properly do so, the substantial questions in the case, but it is insisted by an *amicus curiae*, who, by leave of court, has filed a brief, that the effort of such board to tax the good-will

> of appellees' business ought also to be upheld, because this proceeding is a collateral attack on the action of the board."

Under this condition of the record the court held that since it was averred and admitted to be true that the tax board had made such assessment upon the good will of the newspaper, and as, under the law of the state, such board had no jurisdiction over this species of property, and hence its assessment as to such good will was void and could be collaterally attacked.

The opinion referred to was given under the foregoing circumstances, and such opinion should be considered as only affecting the case in hand. Said opinion is supplemented by an opinion of the same court, found in the same report, on page 388, in the case of Smith, Auditor, v. Smith, et al., *supra*, this latter being a suit involving the same questions, and between the same parties, except that instead of the proceeding being brought against the auditor of state, it was brought against the auditor of the county, and in referring to the case of Hart. v. Smith, supra, the court, on page 389, say:

> "This action is so far a counterpart of the case of Hart v. Smith, ante, 182, that we may refer to the decision in that case for a further statement of the facts alleged in the complaint in this case. The Hart case was presented *on the merits of the controversy*, but in this case the Attorney-General makes the point that the action was prematurely brought."

Then the court goes on to consider the technical question presented by the state, and holds that an injunction would not lie against an assessing officer, as has been heretofore quoted in this brief.

Under the foregoing authorities complainant can not, in a collateral proceeding, be heard to say that the board of tax commissioners did not properly value its property, or in such valuation did not properly consider all the elements and conditions that influenced or determined the value of the mileage of the lines and routes in Indiana. The state board of tax commissioners was the tribunal to which the determination of all these questions was submitted, and their finding and decree can not thus be collaterally attacked, except on grounds of fraud.

So, we say that the decision of the judge of the lower court should be sustained without any consideration of the evidence introduced.

I.

Because the powers of a court of equity can not be invoked to restrain an auditor of state from certifying down to county auditors the assessments made by the state board of tax commissioners.

II.

Because some tax is admittedly due, and an injunction in such case should not issue until complainant has paid, or properly tendered the amount so admitted to be due.

III.

Because the only claim here is that of excessive valuation, and since the state board of tax commissioners is the tribunal constituted by law to determine all questions as to valuation of the lines and routes within the state, their determination on all such questions, in the absence of fraud, is final and conclusive as against a collateral attack.

But if this court goes further, and considers the evidence in this case, it will find that there is absolutely no evidence in the record that the board of tax commissioners in the state of Indiana did not conscientiously follow the directions of the statute in making the assessments complained of. It is presumed they did their duty, and the burden is on appellant to show, by a fair preponderance of the evidence, that they did otherwise. This, appellant did not do or attempt to do, and until it has so proven, it should not be permitted to maintain this action.

The statements of the officers and representatives, with their protests, to the board, were offered, but there is no showing anywhere that this was all of the evidence heard or received by the board. There is nothing in the record to show how the state board arrived at its judgment. The board had jurisdiction over the subject matter; they had the right to hear all the evidence procurable, as to the value of the capital stock of appellant and as to its mileage —whether they did this, the record is silent.

The statements of appellant through its officers to the board were introduced on the trial, but there is no show-

ing anywhere, by any one, that these statements were all the evidence presented to the board. Nor is there any showing how the board arrived at the decision that appellant company should be assessed at $450.00 per mile on its lines and routes in Indiana. This could only be shown by putting the members of the board upon the witness stand, and having them explain their mental processes. This, of course, we maintain would not have been permissible. It would be an unheard of proceeding to put a judge upon the witness stand to explain how he arrived at a given conclusion, or what he included in a given judgment. Yet this was what was necessary for appellant to have done to maintain this action.

The absurdity of such a proposition clearly illustrates the force of our contention that this court can not, in a collateral proceeding, inquire into the correctness of the judgment of the state board of tax commissioners, unless fraud is charged and proven. But how can this court say the board acted fraudulently, when this court is not informed how it performed its duties?

IF THE COURT SHOULD GO FURTHER AND FIND THAT THE STATE BOARD OF TAX COMMISSIONERS HAD NOT INCLUDED THE OCEAN MILEAGE OF APPELLANT, AND DID INCLUDE THE VALUE OF THE STOCKS AND BONDS ALLEGED TO BE HELD AS AN INVESTMENT, THE BOARD WERE WARRANTED IN SO DOING.

The record shows that the complainant company had returned for its mileage—

For the year 1896	$34,220 00
For the year 1897	34,957 00
For the year 1898	163,063 00

(Rec., p. 233.)

In other words, the mileage increase of 1897 over 1896 was 737 miles; of 1898 over 1897 was 129,106, or an increase of mileage of over four times that of the year before; and, in addition to this, it claimed a reduction of its assets in use in the express business of over $15,000,000.00; or, in other words, while the company had increased its mileage over 129,000 miles, it claimed a reduction of its capital of over $15,000,000.00. This was rather a startling condition to present, to say the least, and the board was warranted in regarding it with a strong degree of suspicion, and the burden was upon the complaining company to fully enlighten the board, and give the board all the information in its possession that would show that this increase of mileage and decrease of assets was bona fide.

The record discloses that appellant was exceedingly reticent and sparing of any information upon these subjects,

although the board clearly expressed to appellant's representatives that it was not satisfied with the explanations made in the statements filed, as is shown on pages 230 and 231 of the record, and, in accordance with the suggestions of the board, appellant sent another representative to afford the information desired by said board. This was Mr. L. W. Fargo. His evidence is found on pages 236, 237, 238, 239, 240 and 241 of the record, and at the very first question, this representative of the company, sent to inform and advise the board of these great changes in their statement, entered a practical disclaimer of any knowledge of the facts the board desired to know, and for the next two or three pages, to every question propounded to him touching the matters in which the board was so vitally interested, he frankly admitted that it was out of his division, and not within the range of his knowledge, and he was unable to give any information upon the subjects inquired about. The record shows that there was a studied effort to withhold information from the board, rather than to enlighten it; but the company evinced an absolute indifference to the wishes of the said board—if not a studied effort to keep from said board all information it could possibly conceal.

The apportionment of the enormous increase in mileage is found on page 187 of the record. By this table it is shown that all this mileage is ocean mileage, which is reckoned from the ports of New York and Boston to foreign ports. It is not claimed that any of it is interior mileage; that is, from station to station. (See testimony

of Flagg, page 66 of transcript.) For example, it is claimed that there are two lines from New York to Liverpool, and for this they claim 6,106 miles; that there is one line from New York to Southampton, and for this they claim 3,100 miles; that there is one line from Boston to Liverpool, and for this they claim 2,874 miles; that there are two lines from New York to London, and for this they claim 6,600 miles; that there are two lines from Boston to London, and for this they claim 6,200 miles; that there is one line from New York to Aukland, New Zealand, and for this they claim 11,578 miles, and yet, by the statement made by Francis F. Flagg in evidence in this case, it is shown that they have three offices in Great Britain and Ireland and six on the European continent.

There is no claim that the express matter sent on the ships is attended by any messenger or any person in the employ of the American Express Company, but, on the contrary, as shown by the evidence of Francis F. Flagg, on pages 165, 166-167, and of the transcript of the evidence, ordinary freight is put in packed cases, and valuables are placed in charge of the purser of the ship. It clearly appears that this process was engaged in as early as 1896. See affidavit of James C. Fargo, page 193 of the record. And yet it never occurred to these astute financiers to make any claim for this mileage until after the determination of the former suits in 1897.

The character of the contracts with the various transportation companies is not shown—whether there was a guarantee of a minimum amount or only a fixed rate on the freight handled without regard to the amount.

These facts, together with other facts brought out at the hearing before the state board, and weighed under the rules that the facts as to this mileage were peculiarly within the knowledge of the complainant company, and that the burden was upon them to establish to the satisfaction of the state board that this enormous increase was a valid increase, and considered with the fact that the record discloses that the state board were honest and diligent and earnest in their efforts to get at the true facts in relation thereto, and the indifference and apparent refusal of the complainant company to further enlighten the said board, and to bring before said board any one who could testify of his own knowledge as to how this ocean mileage was apportioned, or how it was managed and controlled and conducted, we do not believe this court is warranted in saying that the state board of tax commissioners were prompted by fraudulent motives in making such assessment. If they had no fraudulent intention, and their acts were not fraudulent, then we contend that this court can not review their proceedings, as is clearly said in the case of Pittsburg, etc., Railroad Company v. Backus, 154 U. S. 421, by Justice Brewer, speaking for the court, on page 434:

> "Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the state board, and in this conclusion we concur. The true cash value of the plaintiff's property in the state of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was

given to this special tribunal, the state board. Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it can not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination can not be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the state government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the state, and gave to the property within a value partly deduced from that without the state. The testimony, however, does not sustain this contention."

The mileage system of taxation has but one purpose, and that is to permit a great business or system which is extended over several taxing jurisdictions to be so assessed for taxation that each taxing jurisdiction gets fair proportion of the taxation borne by the entire system. It is on this theory that the principle has been sustained by the courts. Should the courts so construe the law as to require values to be apportioned between such parts of the system as are within taxing jurisdictions and such portions as are wholly without taxing jurisdictions, this construction instead of making the system a means of fairly apportioning taxes would make it one for the evasion of taxation because the valuation assigned to the parts of the system which were outside of taxing jurisdiction, as for instance ocean mileage, would wholly escape taxation and such a construction would make the system a violation of the constitutional provisions requiring equality and uniformity of taxation.

THE EVIDENCE WHOLLY FAILS TO SUSTAIN THE CONTENTION OF APPELLANT RESPECTING THE OWNERSHIP, SITUS AND USE OF THE STOCKS AND BONDS OWNED BY APPELLANT.

Upon this proposition the same rules would apply as to the powers of this court in reviewing the proceedings of the state board of tax commissioners, as were shown to exist in the argument of the last preceding proposition. The state board of tax commissioners had this question before it, and the question of the ownership of these bonds and stocks before it; it considered the matter, and it must

be presumed that it took all of the bonds and suggestions as to the use of these bonds and stocks into consideration when it fixed the value of the mileage of the complainant company; but we contend that even if this court were to sit in judgment upon its proceedings, it would be compelled to confirm the same.

The contention of the complainant on this proposition is based upon the dicta in the Adams Express Company case, found in 166 U. S. 185, in which Justice Brewer, speaking for the court, on page 222, says:

> "It is suggested that the company may have bonds, stocks or other investments, which produce a part of the value of its capital stock, and which have a special situs in other states, or are exempt from taxation. If it has, let it show the fact. Courts deal with things as they are, and do not determine rights upon mere possibilities."

Continuing, on page 223, he says:

> "Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which, for any reason, affect the question of taxation, it should disclose them."

The burden, therefore, is upon the complainant to show to the satisfaction of the state board of tax commissioners that it has stocks and bonds that are not used in its business, are not a necessary incident or assistance to it in its business, which stocks and bonds have a fixed situs outside the state, if it desires to have the same omitted from taxation. It surely has not done this in this case.

In the first place, an express company is like a bank. It must have a sufficient capital to give it credit, in order to obtain business. The complainant company is a great company, and, in the course of its business, within a year, it handles hundreds of millions of dollars, entrusted to its care and keeping. If the business world did not have confidence in its ability to pay its losses, does any one believe for a moment that it would receive this enormous business? If it should become known throughout the business world that the American Express Company had lost, say, twenty millions of its capital, by some misadventure, would it not impair its business? If the railroads knew that it did not have a dollar of capital outside of its tangible personal property, would they be willing to make contracts for long terms involving thousands of dollars, without any bond or security, as they now do? Would the company be able to give their $750,000 annual bonds to the government? Mr. Flagg, in his testimony, on page 168 of the record, says these investments are not used to obtain these bonds. But, on page 178 he shows that these bonds are given with personal security; these sureties are indemnified by the signature of the company alone. Would these personal sureties be available for such large sums on such indemnity if appellant did not have these great assets. Without their eleven or twelve million dollars of railroad stocks would they be enabled to control the express business of the roads of which those railroad stocks form a part?

With the exception of a few hundred thousand dollars

of these bonds and stocks which this complainant company holds, and which it now says forms no part of its business, every dollar of it is issued by a carrier company or corporation over which or with which the complainant company does business.

Further than this, this company was organized for the purpose of conducting an express business. The powers and duties of the board of directors are set out in their articles of association. These powers and duties are found beginning on page 142 of the transcript, in article 16 of the articles of association. Among other things it is provided:

> "It being, however, expressly understood and provided that no director shall use, or employ the money, credit or name of this company otherwise than in its legitimate business."

The "legitimate business" is set out in article 10, found on page 140 of the record.

The power given the directors to make the investments referred to, is found in Article XVI, of the Articles of Association, on page 144 of the record, where it is provided:

> "They are also authorized to invest the assets of this company in real estate, or in equipment or outfit, or in such stocks, bonds, mortgages, notes or other securities, *as may be deemed desirable for purposes of investment, or be deemed conducive to the furtherance of the business of the company;* and may from time to time sell and dispose of any

of such investments, and re-invest the proceeds thereof, and may anticipate the sale of any of such investments, by the hypothecation thereof to secure the purchase money of any other of such above-named securities as the said board may choose to purchase upon the credit of this company, and such purchases and sales may include the stock of this company: the intention hereof being to give to said board full authority for investment, in its discretion, of all the moneys of this company, with power to purchase any securities upon credit if deemed advisable, *and to hypothecate at any time any or all of its securities in maintenance of such credit.*

Said board may also subscribe in the name of this company for stock or bonds of any railroad in process of construction, or of any other uncompleted enterprise, when believed to be in furtherance of the business interests of this company."

It will be observed from the foregoing provisions that said board of directors are authorized to purchase stocks, bonds, mortgages and other securities for investment, when deemed conducive to the furtherance of the business of the company, and that said securities may be hypothecated to maintain the credit of such company.

Again, how much working capital is necessary for the complainant company? Upon this question there is no evidence that can have any credence. It is true that Francis F. Flagg, third vice-president of the complainant company, on page 176 of the record, says that the appellant could transact its business as it does now with no

other property than the tangible property described, such as safes, horses, wagons and other physical property used in the transportation of its express matter, but this statement is so palpably false that we think we are safe in making the assertion that no unprejudiced person would believe it for a moment.

In fact, Mr. Fargo, on page 248 of the record, says that they have two millions of dollars with which to transact their freight and money business in Europe, most of the time; he also says, on page 258 of the record, that in case judgments are recovered against the company, the money does not necessarily come from New York, as they have money on hands to a greater or less extent, at all offices, out of which they may pay judgments recovered, locally.

It is in testimony that appellant does a great money order business throughout the world, and these money orders are desirable because they can be cashed in almost any bank or hotel of the world; but officers of appellant company have testified that no capital was necessary to carry on this business; that when an order was issued, cash to the amount of the order was received; but, to make the order valuable, there must be either cash or credit at the place of presentation; either, in our opinion, would require very large cash assets.

The articles of association entered into in 1868 absolutely require that the assets should not be reduced below $5,300,000, 25 per cent. of which should be in cash or its equivalent, showing that the persons who had been conducting the American and Merchants' Express realized

that they should have a working capital outside of their tangible property, to that amount, to conduct the business as it was at that time, and we think it is fair to say that $5,300,000 in assets, 25 per cent. of which was cash or its equivalent, was no greater in proportion to the amount of business done by the company at that time, than forty or fifty million is to the business done at the present time.

It is also shown by evidence that these stocks and securities are frequently put up as collateral to procure loans to meet an emergency in the business of the company, and it is owing to the fact that this company has these stocks and bonds, to be used in case of emergency, to pay great losses, that gives it its reputation and high credit which Mr. Flagg speaks about on page 176 of the record.

The credit of a public corporation like an express company is high so long as it promptly meets its obligations, no matter how great they are; but once let its bills go to protest, or its undisputed obligations be delayed until the money can be accumulated to pay them, and Mr. Flagg would soon discover what its reputation and long existence was worth.

We believe that a fair inference—and the only fair inference obtainable from the evidence in this case—is that all of these stocks and bonds are a part of the working capital of the appellant.

The court must bear in mind that the burden was on the complainant company to clearly show, at least by fair preponderance of the evidence, that this capital was not a

part of the working capital of the business. It certainly has not done this.

Counsel contend that the bonds and stocks of appellant company are tangible property, and have a situs in New York, and are not used in its business, and, hence, their value can not be apportioned to the property in Indiana.

We contend that these stocks and bonds are, of necessity, a part of the working capital of appellant; that their possession is a bulwark of solvency and good faith to appellant. It is the great reserve, being of a class of property as ready in a case of emergency as gold itself. It, or its proceeds, can be hurried to any part of the world on a moment's notice. Where is its situs for purposes of taxation?

The record shows that these stocks and securities have been put up as collateral to raise money for uses of the company in cases of emergency. (See Record, page 162.) Where, it is not clear; but it is clear that these stocks and bonds are of the character of transitory assets, just as much so as cash, as the wrecking machinery of a railroad, or reserve sleeping cars that have no fixed lines or routes.

The force, effect and power of this sixteen million dollars of reserve enters into and increases the efficiency and productiveness of the horses and wagons, desks and other appliances of appellant in Indiana. Without this great reserve, insuring prompt settlement of all obligations, and absolute security from losses by robbery, defalcations, panics, or financial upheavals and consequent public confidence, the eight or ten thousand dollars worth of horses,

wagons and such like property in the state of Indiana would not produce the thousands of dollars income annually which it now produces.

It is a part of the working capital of a great financial and transporting company. It may now be in New York city, but tomorrow it may be sent to London, to Paris, to Indianapolis, Chicago or San Francisco, if needed there in any great emergency, to protect the interest of the company.

Where is the situs of the two or three millions of cash belonging to appellant, which is kept in Europe to carry on its business. Is it taxable in Europe, or does it enter in and form a part of the whole system? These stocks and bonds could readily be transported to London and kept there. Under appellant's contention they would thus escape taxation. Would this be permissible either legally or equitably?

It is in evidence that towns the size of Lawrence, Massachusetts, carry on deposit continuously, what it calls its bank, amounting to $800.00. It is a fair inference that similar banks are maintained throughout the United States and Canada, in all towns where it maintains offices, the amounts varying in proportion to the size of the towns, or amount of business transacted. This would amount to an enormous sum. Where is its situs? Is it in the towns where deposited, or is it not rather a part of the whole system, wherever located, devoted to the unity of use of carrying on a great express business? It certainly has not been considered as having a situs in the state of Indiana, *for not a dollar of it is given in for local taxation.*

Our contention is that this sixteen million dollars' worth of stocks and bonds is a part of the working capital, in the nature of cash, that enters into and forms a part of the unity of use in carrying on a great express transportation system, and that their value should be apportioned to the whole system for taxation purposes, since by these valuable assets the bare appliances and accessories of the business are made effective and productive, and the whole system efficient and prosperous, as it is today.

A great railroad corporation has thousands of dollars invested in wrecking machinery. It is kept at some central or terminal station. It is sent over its lines whenever and wherever needed. It may be in Indiana today and in Ohio tomorrow, to Illinois, Missouri or Michigan; yet, we presume no one would contend that the value of this machinery should not be considered in the valuation of the capital stock, and apportioned along the lines of such railroad, other than the one in which such machinery is stationed.

The Pullman Palace Car Company may have—no doubt has—a number of cars at its home yards in Illinois, held in reserve for emergencies. They have no fixed lines or routes. They may be sent to one state; maybe to another; yet, they are not deducted from the value of the capital stock when valued for taxation, and their value is apportiond to the lines of the Pullman Company in the states of Indiana, Ohio and Pennsylvania, although they may never have been in either of said states, and may never be.

So with the value of these stocks and bonds, the unifica-

tion of which, with the bare appliances and accessories in ownership and use, increases the effectiveness of each, and makes a complete and effective whole, in all justice and fairness should be apportioned to the lines and routes in the different states.

In the case of the Pullman Car Company v. Pennsylvania, 141 U. S. 18, the question of the assessment of this company on the mileage basis was before this court. It was contended that the cars of such company were transitory and had no situs in the State of Pennsylvania, but that the situs of such cars was in the State of Illinois, where the company's headquarters and yards were located; but this court held that the situs of such property was not necessarily where the owner resided, and on page 22, Mr. Justice Gray, speaking for the court, says:

> "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule, expressed in the maxim *mobila sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the middle ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has

yielded more and more to the lex situs, the law of the place where the property is kept and used. Green v. Van Buskirk, 5 Wall. 307, and 7 Wall. 139; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664; Harkness v. Russell, 118 U. S. 663, 679; Walworth v. Harris, 129 U. S. 355; Story on Conflict of Laws, §550; Wharton on Conflict of Laws, §§297-311. As observed by Mr. Justice Story, in his commentaries just cited, 'although movables are for many purposes to be deemed to have no situs, except that of the domicil of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'

"For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his domicil, and even if he is not a citizen or a resident of the state which imposes the tax. Lane County v. Oregon, 7 Wall. 71, 77; Railroad Co. v. Pennsylvania, 15 Wall. 300, 323, 324, 328; Railroad Co. v. Peniston, 18 Wall. 5, 29; Tappan v. Merchants' Bank, 19 Wall. 490, 499; State Railroad Tax Cases, 92 U. S. 575, 607, 608; Brown v. Houston, 114 U. S. 622; Coe v. Errol, 116 U. S. 517, 524; Marye v. Baltimore & Ohio Railroad, 127 U. S. 117, 123.

"It is equally well settled that there is nothing in

> the constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. Delaware Railroad Tax, 18 Wall. 206, 232; Telegraph Co. v. Texas, 105 U. S. 460, 464; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 206, 211; Western Union Telegraph Co. v. Attorney-General of Massachusetts, 125 U. S. 530, 549; Marye v. Baltimore & Ohio Railroad, 127 U. S. 117, 124; Leloup v. Mobile, 127 U. S. 640, 649."

In the case of Marye v. Baltimore & Ohio Railroad, 127 U. S. 117, the facts were that the Baltimore & Ohio Railroad was a Maryland corporation, and by the terms of its charter it was exempt from taxation. It had leases and transportation contracts over certain roads in the state of Virginia. It carried on its business in said state by means of its own rolling stock. This rolling stock was not permanently consigned to and used on the Virginia lines, but was changed and interchanged with other rolling stock of the operating company. Taxes were levied upon this stock by the Virginia authorities, and some of it seized and offered for sale in payment of the tax. The sale was enjoined. The question was presented to this court, of the right of the Virginia authorities to levy such a tax on property not having a permanent situs therein. Mr. Justice Matthews, speaking for the court on this point, says, on page 123:

> "It is not denied, as it can not be, that the state of Virginia has rightful power to levy and collect a

tax upon such property used and found within its territorial limits, as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the situs of the Baltimore & Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore & Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found."

But we do not admit that either the market or actual value of the capital stock of appellant company, in 1898,

was only twenty-one millions, and, while that was the market value, as fixed in the statement made by the appellant company to the state board of tax commissioners we do not believe that the taxing act above quoted is so inflexible as to valuation that the state board of tax commissioners are bound to take as the market value of shares of stock the amount fixed in the statement of the express companies, or that the board is bound to conclude that such stock has a market value simply because such statement quotes a market value. If, as a matter of fact, the board, in the investigation it had the right to make, and which it was its duty to make, should ascertain that this company had stocks and bonds, and real estate, and horses and wagons, safes and other appliances, and cash on hand amounting to many millions more than the amount given as the market value of the capital stock, and in addition thereto had established and in successful operation lines and routes covering 34,000 miles in extent—lines and routes it had taken years and millions of dollars to establish; that in addition it had valuable franchises and contracts with transportation companies; that it was paying 6 and 8 per cent. annual dividends upon eighteen million dollars of stock, and each year improving and extending its business, as well as putting aside a large surplus, it would have the right to ignore the statement of the market value and place a proper market value, if it had one, and if it had not, then the actual cash value, as was warranted by the facts.

This position is supported by the decision of the su-

preme court of Indiana in the case of Western Union Tel. Co. v. Taggart, 141 Ind. 281. On page 300 the court say:

> "Were it true, as counsel for appellant contends, that the act of 1893 provides an ironclad mode of assessment by which the board is required to import and assess valuations of property outside the state, there would be no need of any further information than that given by the schedules filed in the first instance.
>
> "The fact that other information is provided for, and agents of the companies and other witnesses may be called, shows that the intention was, as expressly provided in the general tax law of 1891, that the board should assess only property within the jurisdiction of the state, and that only at its true cash value."

This decision is approved in W. U. Tel. Co. v. Taggart, 163 U. S. 1.

In this case there has been no allegation of fraud; there has been no effort to impugn the motives of the state board of tax commissioners. The only intimation of fraud has been in the nature of constructive fraud; that is, that the assessment is of such a character as imputes fraud.

Will the solemn act of a special tribunal, composed of men of the character and standing of the state board of tax commissioners of Indiana, be enjoined upon a bare assumption or imputation?

The figures do not bear out any such contention. The court must presume that the state board of tax commissioners did everything the law required them to do, and,

unless the appellant has clearly shown that the state board of tax commissioners did not do this, then the decision of the lower court should be sustained.

While we do not admit that the board were bound to accept the statements made by appellant company, as to the market value of their capital stock, yet, if this were true, and if the evidence showed that such statements were correct, we insist that the board's action in this behalf did not show fraud, and, for the sake of the argument at least, we present the following upon the figures submitted by appellant company to the state board of tax commissioners:

The statement of appellant to the state board shows that for the year 1898, the value of the capital stock was $21,600,000.00; out of this the law requires the state board of tax commissioners to deduct, first, the assessed (not the market) value of the real estate outside of the state of Indiana, which, in 1898, amounted to $997,220, and, second, the tangible property in the state of Indiana subject to local taxation which, in 1898, amounted to $16,015. This makes the total amount to be deducted in 1898, $1,013,235, leaving a total of property to be considered in taxation in this state of $20,586,765.

The total amount of mileage returned for 1897 (which is the best basis obtainable as to mileage in 1898), was 34,957 miles. $20,586,765 divided by 34,957 gives $589, the amount per mile, which the complainant company could have been assessed, under the statute, but it was only assessed $450 per mile, or upon a total capital of

$15,730,650, or $4,856,115 less than the total amount of assessable capital.

Why did the board make these deductions? What did they consider in making up this amount of nearly five millions of dollars Was it more mileage, or was it deduction from the capital? These are questions this court can not answer, and if the court can not answer, it can not say that it is wrong.

In the succeeding years the assessment per mile is proportionately much less. For example, in 1899, the value of the shares of capital stock was $25,200,000. It was assessed per mile at $450, or, suppose the board considered appellant company had 35,000 miles of lines and routes, this would amount to $15,750,000. The amount of the assessed value of real estate outside of the state, and the tangible property within the state, subject to local taxation, was $985,334. This deducted from $25,200,000 leaves $24,214,666, or, on a basis of 35,000 miles of lines and routes, $691 per mile; but, being assessed at $450 per mile, it shows an assessment upon a capital of $15,750,000, or $8,464,662 less the actual assessable capital stock.

In 1900 the shares of capital stock were apparently worth $26,640,000. The assessed value of the real estate outside of the state, and the value of the tangible property within the state subject to local taxation was $1,144,924, leaving an assessable capital of $25,520,076, or, upon the basis of 35,000 miles, about $730 per mile; it being assessed at $450 per mile left an excess of the capital stock not assessed of $9,770,076.

In 1901 the apparent value of the shares of capital stock was about $40,500,000. It was assessed at $450 per mile. On a basis of 35,000 miles it would be $15,750,000, leaving an excess of assessable capital of about $23,000,000, or two or three millions of dollars more than the value of the stocks and securities.

Does this show fraud? These are matters proper for this court to consider.

These same sections of the act of 1893 came under review in the case of Western Union Telegraph Company v. Taggart, 163 U. S. 1, wherein, on page 29, Justice Gray, speaking for the court, says:

> "The bill then alleges that the commissioners took, as a basis for their assessment, the value of the plaintiff's entire capital stock, estimating the value of the shares according to the price of such shares in the stock exchange market in New York city, and dividing such aggregate value by the total number of miles of the plaintiff's telegraph lines, wherever situated, and thereby obtaining a pretended valuation of $357 per mile of its telegraph line in Indiana, which was 'grossly excessive and far beyond the true cash value of complainant's said property in Indiana.' But the bill immediately proceeds to allege that 'said state board of tax commissioners, in reaching said valuation of complainant's said property in Indiana, did not consider and assess the value of the property of complainant situated in Indiana, otherwise than by pursuing the requirements of said pretended statute.' And the facts stated elsewhere in the bill

demonstrate that the commissioners did not obtain their valuation by merely applying the rule stated in this paragraph. Had they done so, the result would have been that the whole number of shares of stock, being 948,200, at $94.50 a share, would have been $89,594,900, which, divided by 189,576, the whole number of miles of all the plaintiff's lines, would give a value per mile of upwards of $472, or nearly one-third more than the valuation adopted. * * *

"It certainly has no tendency to show that the tax commissioners did not, as they were required to do by the statute, as since construed by the supreme court of the state, assess the plaintiff's property in Indiana at its true cash value, according to their best knowledge and judgment, and after making all proper deductions, on account of larger proportional values of its property and business outside the state, or for any other reason. * * * The allegation that 'the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid,' 'necessarily includes, and does in fact include values, which are no part of the true cash value of the property of complainant in Indiana," is but equivalent to an assertion that the decision of the tax commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this court in Pittsburg, etc., Railway v. Backus, above cited, 'Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into in-

quiry before the courts, it can not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' 154 U. S. 434, 435."

In Pittsburg, etc., Railway Company v. Backus, 154 U. S. 421, on page 435, Mr. Justice Brewer, speaking for the court, says:

"The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by first ascertaining the total value of the company's property, and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to wit, the value of that part of the company's road in the state of Indiana. *Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value as compared with the general line of the road does not prove that the board did not take those peculiar matters into consideration.* On the contrary, the reasonable presumption is that if its attention was called by the company to those facts it *did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company.* Indeed, its certificate is affirmatively that it took into consideration 'all other matters appertaining thereto that would assist the board in arriving at a true

cash value' of the parts of the road within the state of Indiana. *That the aggregate value of the entire property of the company was evidence properly receivable and bearing upon the question of value of that part in Indiana is a proposition which, as we have heretofore said, is clearly established both on reason and authority.* * * * The case narrows itself down to this: Is testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meagre testimony."

NO COURT WILL ENJOIN THE COLLECTION OF TAXES UNLESS FRAUD IS CHARGED AND PROVEN AGAINST THE TAXING OFFICERS. OTHERWISE THE COURT WOULD SUBSTITUTE ITS JUDGMENT FOR THE JUDGMENT OF THE TAXING OFFICERS, WHICH WILL NEVER BE DONE UNLESS FRAUD IS FOUND AS A FACT.

Adams Express Co. v. Ohio, 165 U. S. 194, 229;

Adams Express Co. v. Ohio, 166 U. S. 185;

American Express Co. v. Indiana, 165 U. S. 255;
Adams Express Co. v. Kentucky, 166 U. S. 171;
Sanford v. Poe, 69 Fed. 546;
State v. Adams Express Co., 144 Ind. 549;
P., C., C. & St. L. Ry. Co. v. Backus, 133 Ind. 451, 452;
Western Union Telegraph Co. v. Taggart, 141 Ind. 281.

We, therefore, conclude on this proposition:

One. That appellant does not show that the stocks and bonds in question are not a part of its working capital; but on the contrary, the evidence does show by a fair inference that it is a part of the working capital, with no fixed situs, and is properly apportioned to the lines and routes in the several states;

Two. That there is no showing of fraud on the part of the tax board, or that the board did not conscientiously follow the provisions of the statute, and, hence, this court can not review their decision;

Three. That the evidence does show that the board fairly considered the valuation of the complainant's property and made proper and fair deductions for idle capital and additional mileage.

THE FEDERAL COURT WILL NOT RESTRAIN OR INTERFERE WITH THE COLLECTION OF TAXES ASSESSED BY THE STATE TAXING OFFICERS, EVEN TEMPORARILY, UNLESS THE TAXES ARE WHOLLY VOID.

Cooley on Taxation, 775;
Desty on Taxation, 657;
Palmer v. Township, 16 Mich. 176;
Ottawa Glass Co. v. McCaleb, 81 Ill. 556;
Pittsburg, etc., Ry. Co. v. Board of Public Works, 172 U. S. 32, 37;
P., C., C. & St. L. C. R. v. Backus, 154 U. S. 435;
P., C., C. & St. L. C. R. v. Backus, 133 Ind. 625;
High on Injunctions, sec. 485.

We submit that there are no allegations worthy of a suggestion of fraud in the bill of complaint in this cause.

We do not say that any of the bonds and stock located in New York were taxed by the state board of tax commissioners of Indiana; nor do we say that the value of them were considered as a part of the value of the express company; nor do we say what mileage was considered or how it was apportioned.

We do not know and can not inquire what the tax board took into consideration in making up its estimates. We do know that if every mile of the lines and routes of appellant that is within a taxing jurisdiction was assessed at the same rate as the mileage in Indiana, the total assessment at such rate would be many millions of dollars less than the admitted value of the appellant's assessable property.

Appellant was notified and appeared before the tribunal authorized by law to assess its property. If it failed to so inform such board as to its mileage, or as to its assets, so that either too small a mileage or too large assets were considered in making such estimates, that is the fault and misfortune of appellant, and is no ground for equity interference by collateral attack.

The evidence in this case clearly shows that appellant does not come into this court with the "clean hands" required by the rules of equity jurisprudence. It has not performed its duties and discharged its obligations, and, while derelict itself, it seeks to compel a sovereign power to perform a duty for it.

There is no equity in appellant's contention. Here is a company with property admittedly worth $40,000,000, in reality worth a great deal more, whose stock sells upon the market for that. It pays six and eight per cent. dividends upon enormously watered stock—watered more than two hundred per cent., and still it adds large sums to its surplus each year and increases in value nearly one hundred per cent. in six years. To do this it must have great earning power, and whatever property is worth for income and sale, it is worth for taxation. This is the fundamental rule laid down by the supreme court, speaking through Justice Brewer, in the tax cases above cited. For these reasons we earnestly insist that the judge of the lower court did not err in dismissing the bill in this cause for want of equity.

The intent and purpose of this act, and of all similar

acts, is to make such companies as appellant bear its proportion of the burdens that its business of necessity casts upon the governments through which its lines extend—no more, no less. The scope and effect of this law and the duties of express companies under them is so forcibly and pertinently stated by Judge McCabe in the case of State v. Adams Express Co. et al., 144 Ind. 549, on page 560, where he says:

> "There is no complaint here that the assessment was too high, but the complaint is confined solely to the objection that the assessment is not on property. This, we think, we have shown is not true, either as a matter of law or fact. It is not surprising that the increase of burdens of taxation brought about by the act in question on the property of such companies should arouse complaints. Hitherto such companies, for want of proper legislation, have well-nigh escaped taxation in this state. It is but natural that the taxgatherer should be made an unwelcome visitor by many good people. But the good citizen should take comfort in the payment of his taxes when reminded that it is such payment that enables the majesty of the law to walk by his side, and shield and protect him against the lawless and violent, both day and night, in the enjoyment of his life, liberty and property.
>
> "So, too, these appellees have great need of such protection, and ought to contribute their just share to support the government that affords it."

There is no claim in this case that the actual value of the capital stock of appellant would not warrant the assess-

ment laid upon it in the state of Indiana; at least, there is no evidence in the record to this effect. And we submit there can be none.

The assessment as placed does not cast a burden upon the appellant greater than that cast upon other companies similarly situated.

For the foregoing reasons, we insist that the judgment of the court below should be affirmed.

Respectfully submitted,

CHAS. W. MILLER, *Attorney-General,*
Attorney for Appellee.

CASSIUS C. HADLEY,
Of Counsel.